LIBRARY
SUPREME COURT, U. S.

FILED
OCT. 24 1967
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

NO. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT,
Petitioners,

v.

FOUR COUNTIES WATER USERS ASSOCIATION
and
LYNN A. MATHESON,
Respondents.

REPLY OF PETITIONERS TO BRIEFS IN OPPOSITION

KENNETH BALCOMB
Delaney and Balcomb
P.O. Drawer 790
Glenwood Springs, Colorado
81601

ROBERT L. McCARTY
935 Washington Building
Washington, D.C. 20005

Attorneys for Petitioners

October 24, 1967

Washington, D. C. · THIEL PRESS · 202 · 393-0625

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

NO. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT,
Petitioners,

v.

FOUR COUNTIES WATER USERS ASSOCIATION
and
LYNN A. MATHESON,
Respondents.

REPLY OF PETITIONERS TO BRIEFS IN OPPOSITION

The substantially identical briefs in opposition filed by the two respondents attempt to minimize, but cannot evade, the grave impact of the decisions below on the water resource development program of the United States in the basin of the Colorado River within Colorado. This impact (1) is substantial and highly adverse, in derogation of the program established by Congress in the Colorado River Storage Project Act (70 Stat. 105, as amended, 43 U.S.C. § 620 – See Petition, App. C), and (2) results from improper application of a double standard for water rights which discriminates against the Federal Government.

1. **The Adverse Impact on the Federal Reclamation Program.**

The Four Counties brief (p. 6), in seeking to support its proposition that a program of the Federal Government is not jeopardized by the decisions below, concludes that:

> ". . . only six of the 30 projects listed [in Appendix F of the Petition] could be affected and these are projects where the least amount of work has been done and money expended."

Any one, let alone six (Rabbit Ear, Troublesome, Wessels, Toponas, Juniper, Parshall), is bad enough. The stake of the Government is not limited, however, to the sum of $325,000 already expended by the United States on these six projects. As shown in Appendix G attached to this Reply, at least two-thirds of the 30 projects, not just six, stand to be affected. Appendix G, similar to Appendix F of the Petition, is a letter from the U.S. Bureau of Reclamation showing the 30 projects and the dates of the conditional water decrees, if any, held on them. As will be noted, 14[1] of those having decrees have not held them long enough to be "protected" by the 1963 Colorado statute cited by Respondents[2]; three are partially so affected and could therefore

---

[1] Rabbit Ear, Troublesome, Wessels, Toponas, Juniper, Burns, Flattops, Yellow Jacket, Bluestone, San Miguel, Animas-La Plata, Florida, Silt and Savery-Pot Hook. Of these projects, Florida and Silt are built and in operation; Savery-Pot Hook has been authorized by Congress and is presently under final planning; Yellow Jacket and Bluestone are in the detailed feasibility investigation stage; and San Miguel and Animas-La Plata are before Congress for authorization.

[2] Colo. Rev. Stat. Ch. 148, Art. 9 § 17 (1963). This statute has yet to be fully tested and its efficacy as "protection" is thus still problematical.

be rendered infeasible[3]; and of course the three[4] projects having no decrees as yet have no protection whatsoever if the survey and other work already done on them may not be considered by the Colorado courts in awarding conditional decrees. Accordingly, instead of "only" six projects, at least 20 could be affected. As shown in Appendix F, through June 30, 1967, the United States had spent $24,337,039 on these. The loss of these funds, however important, is not as significant as the loss of the program. Respondents concede that their interests and those of the Government in the projects involved are mutually exclusive. If the decisions below are not reversed, the federal reclamation program established by Congress for the Colorado Basin will not materialize.

2. **The Discriminatory Double Standard.**

Significantly, the opposition filed by Four Counties admits that this group is now attacking a 1954 priority date awarded the Juniper project on the basis of U.S. Bureau of Reclamation surveys. The decisions below, of course, will figure strongly in this effort. This $169,000,000 project, which includes a key reservoir to be built on the Yampa River to contain 1,710,000 acre feet of regulatory capacity,[5] was specifically mentioned in the Colorado River Storage Project Act of 1956 as follows:

---

[3]This is so because on these three projects – Parshall, Dallas Creek and West Divide – only portions of the water rights needed for the projects have been awarded decrees. Both Dallas Creek and West Divide are now before Congress for authorization.

[4]Hayden Mesa, Eagle Divide and Battlement Mesa. The final feasibility study of the Bureau of Reclamation on Battlement Mesa is now being circulated among interested Federal and State agencies for comment.

[5]See Juniper Project, Colorado and Utah, Reconnaissance Report, July 1963, U.S. Bureau of Reclamation, U.S. Department of the Interior, p. 18.

> "The Secretary, concurrently with the investigations directed by the preceding paragraph, shall also give priority to completion of a planning report on the Juniper project." (See Petition, Appendix D).

As of June 30, 1967, the United States had already spent $204,529 in planning on this project. It is manifestly ridiculous, in the face of this Congressional directive and in the face of this expenditure of funds by the executive branch of the Government to find no intent by the United States to go forward with this project and to take water for it.

Both respondents agree that:

> "*Commencement of work by surveys,* which are used to file maps with the State Engineer, *has long been the kind of work that will initiate an appropriation under Colorado water law"* (citing cases; emphasis supplied). (Matheson brief, p. 4; Four Counties brief, p. 4).

Such survey work, of course, was actually commenced by the United States Bureau of Reclamation on all four of the projects involved in the 1950-1954 period. This is clear from the record as detailed in the petition for a writ of certiorari (Pet. pp. 6-8). Respondents take no exception to these facts found sufficient in the trial court for the award to petitioners, on behalf of the United States, of 1950 and 1954 priority dates which was when the surveys were accomplished. In brushing these facts aside and in awarding priorities to respondents on subsequent work far less detailed and expensive than that accomplished by the United States, the Colorado Supreme Court has established a double standard discriminating against the Federal Government. The long history of work and the enactments of Congress looking toward final accomplishment of this work – all well before the 1958 priorities awarded to respondents for totally different undertakings – clearly establish an intent to appropriate water quite at odds with the holdings below that these acts of the United States constituted ". . . no intent to take water and no physical demonstration from which

such intent could be inferred so as to constitute the initial step in an appropriation." (Petition, App. A, p. A-6); and ". . . lacked the fixed purpose and intent to effect a diversion of water. . ." (Petition, App. B, p. 4)[6]

The decisions are thus not only plainly wrong. They overlook completely the "comprehensive scheme" for the Upper Basin of the Colorado River established by the Congress in the Storage Project Act of 1956, akin to that adopted by Congress for the Lower Basin in the Boulder Canyon Project Act of 1928 and as so construed by this Court in *Arizona v. California*, 373 U.S. 546, 565 (1963). The intent of the United States under this legislation has been determined below in a manner which largely vetoes a Congressional design of major significance. The questions are cognizable by this Court and certiorari should be granted to permit their full examination.

Respectfully submitted,

KENNETH BALCOMB
Delaney and Balcomb
P. O. Drawer 790
Glenwood Springs, Colorado
81601

ROBERT L. McCARTY
935 Washington Building
Washington, D.C. 20005

Attorneys for Petitioners

October 24, 1967

[6]Respondents direct attention to the change of claimed priority dates by petitioners for the four projects here involved and for the Juniper Project. For many years Colorado lawyers thought the Colorado map and statement Act, Colo. Rev. Stat. Ch. 148 Art. 4 § 1, required the map and statement to be filed within sixty (60) days of commencement of survey if the date of priority was to date back to the date of commencement of survey. This was forcefully urged but rejected by the Supreme Court of Colorado in *Metropolitan Suburban Water Users Assn. v. Colorado River Water Conservation District*, 148 Colo. 173, 365 P.2d 273 (1961). This decision resulted in amending the claimed dates of priority for the 4 projects here involved and for the Juniper Project.

APPENDIX "G"

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY
REFER TO: 430

OCT 23 1967

Colorado River Water Conservation District
P. O. Box 282
Glenwood Springs, Colorado 81601

Gentlemen:

Supplementing our letter to you of August 10, 1967, we submit the following list of projects with date of decrees:

Project	Date of Entry of Decree
Rabbit Ear	9/5/64)both subject to being amended,
Troublesome	9/5/64(by decision of Colorado Supreme Court, according to Case No. 21566
Wessels	3/30/64)same as above, except according
Toponas	3/30/64(to case No. 21358
Juniper	6/22/62 Subject to being modified by Civil Action 2110, District Court of Moffat County
Burns	9/13/67
Hayden Mesa	None--adjudication pending
Flattops	District 53--9/13/67
	District 43--11/21/66
	District 39--11/10/66
Parshall	5/22/57 Ute Park Res. only.
Eagle Divide	None
Yellow Jacket	District 43--11/21/66
	District 44--none, proof submitted
Grand Mesa	1/31/64
Battlement Mesa	None--adjudication pending.
Bluestone	11/10/66
Upper Gunnison	District 28--12/15/61
	District 59--1/27/61
Basalt	6/20/58
	8/3/59
Dallas Creek	4/14/61 Four reservoirs only.
West Divide	District 38--6/20/58
	District 45--7/9/65
	District 40--none

Project	Date of Entry of Decree
Dolores	3/22/63
San Miguel	1/16/67
Animas-LaPlata	3/21/66
Collbran	10/8/62
Florida	3/21/66
Paonia	3/20/54
Smith Fork	1/31/64
Curecanti	District 59--1/27/61 District 62--3/30/60
Silt	11/10/66
Bostwick Park	3/30/60
Fruitland Mesa	District 40--1/30/64 District 59--1/27/61
Savery-Pot Hook, Colorado	District 54--6/23/64 District 55--none.

Sincerely yours,

Maurice N. Langley

Acting Commissioner